

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

IBLA 78-20 Decided March 10, 1978

Appeal from decision of Phoenix District Manager, Bureau of Land Management, Arizona, assessing triple damages in right-of-way trespass cases AZ-020-6-68 and AZ-020-6-77.

Affirmed as modified.

1. Regulations: Interpretation—Rights-of-Way: Generally—Trespass: Measure of Damages

Arizona Revised Statutes § 37-502, which provides for damages in civil actions for trespass on State lands, does not apply to cases involving right-of-way trespass on Federal lands located in Arizona.

2. Trespass: Generally—Trespass: Measure of Damages

A person intending to occupy land has a duty to ascertain its owner and to gain his consent to utilization prior to such occupancy. A person cited for a previous similar trespass for which he paid damages may properly be deemed to be a willful trespasser. Under Arizona law, punitive damages for willful trespass are permissible, and the imposition of triple damages for a willful trespass is not inappropriate.

APPEARANCES: Laura F. Davidson, Esq., Mountain States Telephone & Telegraph Company, Denver, Colorado, and George T. Cole, Esq., Fernmore, Craig, von Ammon, and Udall, Phoenix, Arizona, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Mountain States Telephone & Telegraph Company (Mountain States) appeals from an August 4, 1977, decision of the Phoenix District

Manager, Bureau of Land Management (BLM), Arizona, assessing triple damages in right-of-way trespass cases AZ-020-6-68 and AZ-020-6-77.

The cases involve Mountain States' underhanging telephone lines on power poles constructed on Federal lands by the Arizona Public Service Commission, which is not a party in this matter. It is not disputed that the Public Service Commission had been granted permits by the BLM to construct the poles, nor is it disputed that Mountain States had not been issued rights-of-way for the telephone lines on the poles for the time periods in question.

The issue for decision is the proper measure of damages. Mountain States had admitted to damages of \$16 and \$25 in AZ-020-6-68 and AZ-020-6-77, respectively, and had submitted payments in those amounts. The District Manager's decision required payment of triple damages of \$48 and \$75. Mountain States appealed.

43 CFR 2801.1-4 provides: "Any occupancy or use of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for trespass." The measure of damages for such trespass is given at 43 CFR 9239.0-8:

The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of *Mason et al. v. United States* (260 U.S. 545, 67 L. ed. 396), will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

In applying the above-quoted regulations, the District Manager cited Arizona Revised Statutes § 37-502 as the material State law. That statute says:

Whoever commits any trespass upon state lands as defined by § 37-501 is also liable in a civil action brought in the name of the state in the county in which the trespass was committed, for three times the amount of the damage caused by the trespass, if the trespass was wilful, but for single damages only if casual or involuntary.

On this basis, the District Manager assessed triple damages.

Mountain States argues in its brief on appeal:

No real effort has been made to justify the application of A.R.S. § 37-502 to the facts of the present

case. On its face, the statute is inapplicable to trespass on federal land. The statute expressly states that it applies only to "trespass upon state lands." The trespass allegedly committed by Mountain Bell did not occur on state lands. A statute concerning trespass on state lands is manifestly inapplicable to trespasses which occur on Federal lands. Furthermore, no fair reading of the relevant federal regulations will authorize such a tortured construction of A.R.S. § 37-502.

Alternatively, Mountain States contends that its actions did not constitute "willful" trespasses for which the State statute, supra, provides for triple damages.

[1] We hold that Arizona Revised Statutes § 37-502, which provides for damages in civil actions for trespass against State lands, is not intended under 43 CFR 9239.0-8 to provide a measure of damages in cases involving right-of-way trespasses on Federal lands located in Arizona. While 43 CFR 9239.0-8 is general in mandating that the "rule of damages * * * will be the measure of damages prescribed by the laws of the State in which the trespass is committed," it is clear from the wording of the regulation that the BLM is not free to choose any measure of damages in any factual situation provided for in the pertinent State law. A.R.S. § 37-502 by its own wording is limited in application to trespasses against the State of Arizona's land. Therefore, on its face it is not applicable to lands of the Federal Government located in Arizona.

[2] We note that in Charles H. Weber, A-23853 (July 12, 1944), and J. Caleb Boyett, A-23997 (July 5, 1945), the Department, in assessing damages for occupancy trespasses in Arizona, charged that amount for which the trespasser would have been responsible had his occupancy been authorized by the BLM's predecessor agency, the General Land Office. This is tantamount to charging single damages for non-willful trespass. See Gila Water Co. v. Gila Land & Cattle Co., 238 P. 336 (Ariz. 1925).

The appeal argues that the trespass was not willful and that only nominal damages are appropriate. We disagree.

Appellant was cited for a similar trespass in January 1972 for which it paid damages. That appellant's records did not reflect that the trespassed land was public land does not exculpate appellant since it had a duty to ascertain ownership and gain consent to its occupancy prior to utilizing that land. Punitive damages are appropriate, under Smith v. Chapman, 564 P.2d 900 (1977), cited by appellant, "for acts * * * with a reckless or indifference to the interests

of others [sic]." Appellant's conduct falls within that rubric. Punitive damages for trespass willful in character are recognized by Arizona law. Lee v. Johnson, 70 Ariz. 122, 216 P.2d 722 (1950). ^{1/} In the cases at bar, the imposition of triple damages for the willful trespasses was not inappropriate. Nominal damages urged by the appellant are obviously insufficient to satisfy Lee's requirements.

Mountain States' request for a hearing before an Administrative Law Judge, 43 CFR 4.415, is denied since it does not appear that such a hearing would serve any useful purpose.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Frederick Fishman
Administrative Judge

I concur with the main opinion to the extent that it holds that treble damages are appropriate. See my separate opinion.

Edward W. Stuebing
Administrative Judge

I concur in the result. See the attached opinion.

Joseph W. Goss
Administrative Judge

^{1/} In Lee the damages awarded consisted of \$50 actual and \$250 exemplary damages. The court stated: "The amount of exemplary damages is moderate rather than excessive."

ADMINISTRATIVE JUDGE STUEBING CONCURRING IN THE RESULT:

Respectfully, I must disagree with the holding in the main opinion that the District Manager wrongly adopted the measure of damages prescribed by Arizona Revised Statutes § 37-502.

The Department's regulation, 43 CFR 9239.0-8, does not contemplate that the State in which the offense occurred would have enacted legislation prescribing the measure of damages for trespasses on Federal lands within that State. The State, of course, would legislate only with respect to the measure of damages for trespass on land which was within the jurisdiction of that State. Thus, the regulation operates to adopt the measure of damages prescribed by state law for similar offenses committed on lands within that State's jurisdiction.

In this instance the Arizona statute prescribes the measure of damages for trespasses occurring on public lands of the State of Arizona. It seems apparent to me that our regulation adopts and requires the application of the same measure of damages for similar trespasses occurring on public lands of the United States which are within the State of Arizona, there being no Federal law which prescribes a different rule.

Accordingly, I am of the opinion that the District Manager acted correctly, and I would affirm his decision without modification. However, as the amount of damages assessed is the same, I concur in the result.

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

As I understand Judge Fishman's analysis of Arizona law, the Arizona statute establishing damages for trespass on State lands does not apply because by its terms it encompasses State lands only. Departmental regulation 43 CFR 9239.0-8 adopts the Arizona law as to measure of damages for the particular type of trespass occurring on other lands generally. I agree with this approach, and would add that it is consonant with that in Mason v. United States, 260 U.S. 545 (1923), upon which 43 CFR 9239.0-8 is specifically based. In Mason, Federal oil was taken without authorization, and the State law applied was a general statute for measuring damages for conversion by a trespasser on lands in Louisiana.

As to treble damages, appellant's Right-of-Way Supervisor describes identical reasons for the trespasses in his July 26, 1977, letters to the Area Manager:

In any event, when we constructed the overhead telephone line, power poles were in place upon the property; and we, in good faith, believed we could attach to the poles under our agreement with the Power Company and use their right of way. Also, at the time of the installation our records did not indicate any Bureau of Land Management land in the area. Therefore, our failure to secure right of way was casual or involuntary and certainly not willful. Also, these facts give use to a claim or color of title.

Under the record, I do not agree that appellant's trespass was an act which was reckless or indifferent to the rights of others and for which treble damages should be imposed. For the trespasses occurring after October 21, 1976, the Secretary may require reimbursement under 43 U.S.C.A. § 1734 (West Supp. 1977) for the reasonable cost of documents relating to trespassed lands. The decisions refer to the cost of administrative processing of the trespasses as a reason for charging treble damages. Because the extra charges imposed are moderate, \$32 and \$50, respectively, I would impose those charges for reimbursement of administrative costs. I therefore, concur in the result.

Joseph W. Goss
Administrative Judge

